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SUBJECT INDEX

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IN THE

Supreme Court of the United States

October Term, 1971
No. 70-18

JANE ROE, JOHN DOE, and MARY DOE,
Appellants,

JAMES HUBERT HALLFORD, M.D.,
Appellant-Intervenor,

vs.

HENRY WADE,
Appellee.

On Appeal From the United States District Court for the Northern District of Texas.

No. 70-40

MARY DOE, *et al.*, etc.,
Appellants,

vs.

ARTHUR K. BOLTON, Attorney General of the State of Georgia, *et al.*, etc.,
Appellees.

On Appeal From the United States District Court for the Northern District of Georgia.

Motion for Leave to File Brief Amici Curiae on Behalf of Women's Organizations and Named Women in Support of Appellants in Each Case.

The individuals and organizations whose names are appended hereto respectfully move for leave to file a brief *amici curiae* in these cases. Appellants' attorneys in these cases have consented to the filing of this brief. The respective attorneys for each of the appellees and for appellant-intervenor have not so consented.

All the associations listed represent women's groups, which, although they have otherwise diverse activities and aims, share a continuing interest in social problems as they affect women.

The American Association of University Women is an organization of more than 170,000 members, all graduates of accredited colleges and universities. The Association has a long-standing concern with the rights and the advancement of women.

The National Board of the Young Women's Christian Association of the United States of America is entrusted with the continuing work of the National Association, which has been organized "to advance the physical, social, intellectual, moral and spiritual interests of young women." The Association itself is a membership organization wth more than 2½ million members and participants.

The National Organization for Women is a civil rights organization founded in 1966 and with approximately 15,000 members throughout the United States. It is working actively to bring women into the mainstream of American society and in line with that policy, has affirmed its belief that there is a basic human right to limit one's own reproduction.

The National Women's Conference of the American Ethical Union is composed of member delegates (as well as members at large) of the various local Women's Conference organizations, representing approximately 500 women.

The Professional Women's Caucus is an organization of professional women bound together to use their professional skills to advance the status and welfare of all women.

The Unitarian Universalist Women's Federation is an organization of 17,000 church women in the United States and Canada. Its program is broadly concerned with denominational concerns, the rights of women, service projects for children, concern for the aging, peace, and other issues. It has been carrying on an educational program for the abolition of abortion laws for several years.

The Women's Alliance of the First Unitarian Church of Dallas is an organization affiliated with the First Unitarian Church of Dallas which has a general interest in social matters and has been active in conducting studies in the field of abortion.

The individuals whose names are appended hereto are citizens of the United States, and all are women who have achieved recogntion in their respective fields of endeavor, including such diverse areas as literature, anthropology, the creative arts, social research, law, and civic activities.

Each of the individuals and organizations urges upon the Court the position contended for in this brief because of a firm conviction that it is a woman's right, as part of the most elementary concepts of human freedom, dignity and equality, to determine the time when and the circumstances under which she will bear a child. Each of the *Amici* believes that the full development of an individual woman's potential as a complete human has been and can be thwarted by an inability to make this most fundamental decision for herself, without the imposition of unnecessary state controls—controls which are based on outmoded medical and social theories and which were formulated in periods when women were regarded legally, economically and socially as having a subordinate role in society.

Amici's concern arises from the fact that the assertion by a woman of her fundamental rights conflicts with the laws of nearly all the states which, almost totally in most instances, and in varying degrees of latitude in the others, restrict the grounds upon which a woman can determine the number and spacing of her children, by limiting the circumstances in which a lawful abortion can be performed.

Amici believe that this Court should have before it all expressions concerning the overwhelming importance of the question. *Amici* urge that this personal right be recognized as constitutionally protected. Having widely observed the effects of existing restrictive laws upon women who have submitted themselves to illegal and unsafe abortions simply because there existed no lawful way in which they can make the choice of when to bear a child, and having widely observed the effects on the persons directly involved, their families and society as a whole where unwanted children are born, *Amici* are impelled to urge their position on the Court. *Amici* would not be understood as advocating abortions as being a necessarily desirable solution to particular personal or social problems. We do contend, however, that each woman has the right to make the decision for herself, unimpeded by restrictive laws, except as they demonstrably seek to regulate a matter of legitimate state concern such as the practice of medicine.

We believe that this brief, which reviews the constitutional basis for the conclusion that each woman possesses such a fundamental right in the light of current community standards, will be of assistance to the Court.

For these reasons we respectfully request leave to file the within brief *Amici Curiae*.

Respectfully submitted,

NORMA G. ZARKY,
Attorney for Movants.

IN THE

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Amici Curiae Brief on Behalf of Women's Organizations and Named Women in Support of Appellants in Each Case.

Opinions Below.

The opinion of the United States District Court for the Northern District of Texas (*Roe v. Wade*) is reported at 314 Fed. Sup. 1217.

The United States District Court for the Northern District of Texas ruled that the Texas anti-abortion

statutes were unconstitutional on their face, being excessively vague and overbroad, but denied any injunctive relief.

The opinion of the United States District Court for the Northern District of Georgia (*Doe v. Bolton*) is reported at 319 Fed. Sup. 1048.

The United States District Court for the Northern District of Georgia held that the portions of the Georgia abortion laws, which imposed substantive qualifying requirements, were unconstitutional, but the court refused to enjoin future enforcement of those code sections. The remainder of the Georgia abortion statute was held to be valid exercise of state authority and both declaratory and injunctive relief were denied.

Jurisdiction.

By separate orders, both dated April 26, 1971, the question of jurisdiction in each case was postponed to the hearing of the cases on their merits. Jurisdiction of this Court in both cases is founded on 28 USC §1253.

Interest of Amici Curiae.

The interest of *Amici Curiae* has been set forth in the accompanying motion to file this brief and need not be reiterated here.

Summary of Argument.

Despite the numerous issues (including the question of the jurisdiction of this Court, postponed to the hearing on the merits) involved in these cases, this brief will address itself only to one, so as to avoid repetition of the arguments presented by appellants and by other briefs of *amicus curiae*. We believe that the time is ripe

for this Court to announce that the right of a woman to determine the number and spacing of her children is a fundamental constitutional right of a personal nature deserving of special protection, which can be impinged upon by a state only where (which is not the situation here) a most urgent and compelling contrary interest exists. Recognition of this right now exists within the community and in judicial decisions; full recognition is essential to the emergence of women as equal members of society.

The attempted denial of this right by the anti-abortion laws of most of the states, including those of Georgia and Texas, involved in the cases here, is a direct deprivation of the rights of women, imposing, as it does, restrictions on personal freedom; a necessary concomitant of that deprivation is to burden women, their families and society in general with vast numbers of unwanted children.

Although the Texas abortion laws permit abortion only in the single instance where the mother's life would be saved and the Georgia laws permit abortion in certain additional categories, both, in the view of *Amici* involve such impingement upon what may be called the right of reproductive autonomy that it is appropriate to treat the particular issue, to which this brief addresses itself, as being the same in both cases.

ARGUMENT.

A. The Nature of the Woman's Right.

The personal, constitutional right of a woman to determine the number and spacing of her children, and thus to determine whether to bear a particular child (which many refer to as a right of "reproductive autonomy") evolves inevitably from the recognition afforded by this Court to the deep and inviolate nature of those human interests which relate to marriage, sex, the family and the raising of children. They are some of the most fundamental aspects of living, which every member of society must possess, free of all restraint, except where society as a whole has a clear and demonstrably compelling interest to protect. In a series of decisions, spread over half a century, this Court has had several occasions to enunciate the constitutionally protected interests that exist in each of these areas.

Meyer v. Nebraska, 262 U.S. 390 (1923), chronologically the first of the decisions, upheld the right of parents to be free of unreasonable restraints in the education of their children. In so holding, the Court emphasized the broad, not narrow, concept of those human liberties which are protected by the Constitution. It stated at page 399:

> "While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration, and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to

worship God according to the dictates of his own conscience, and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."

Carrying the concept forward, *Pierce v. Society of Sisters of Holy Names of Jesus and Mary*, 268 U.S. 510 (1925) struck down, as an unreasonable interference with a fundamental liberty, an attempt to require attendance only at public schools. Again the Court stressed the broad base on which these personal constitutional liberties rests, saying (pp. 534-535):

> "Under the doctrine of Meyer v. Nebraska, 262 U. S. 390, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state. The fundamental theory of liberty upon which all goverments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

Important as is the right of parents to have the utmost possible freedom in the rearing and education of their children, we believe that it is even more fundamental that an individual have free choice in the

matter of becoming a parent. If bearing an additional child or children in an already large family will deprive the parents of the economic means of properly educating their existing children, the freedoms safeguarded by *Meyer* and *Pierce* become nugatory.

Subsequently, the statute of Oklahoma permitting involuntary sterilization was held invalid. In language which now has particular pertinence relative to laws which require an unwilling woman to carry an unwanted pregnancy to term, the Court said in *Skinner v. State of Oklahoma,* 316 U.S. 535 (1942) at p. 541:

> *"There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury.* He is forever deprived of a basic liberty. We mention these matters not to reexamine the scope of the police power of the States. We advert to them merely in emphasis of our view that strict scrutiny of the classification which a State makes in a sterilization law is essential. lest unwittingly or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of fair and equal laws. (Emphasis supplied)."

There is likewise "no redemption" for the woman who has been compelled by the state, against her will, to give birth to a child. Because the point deserves separate emphasis, the lifelong onerous effects, equal in seriousness to those described in *Skinner,* of the present restrictive abortion laws are discussed in Part C, *infra,* of this brief.

Skinner was the first case to deal with the inviolate personal freedoms of an individual relating to matters

of sex and procreation. *Griswold v. Connecticut,* 381 U.S. 479 (1965), invalidating the Connecticut statute prohibiting the use of contraceptives, was next. In a series of opinions by members of the Court, varying views were expressed of the precise constitutional source from which arises this area of deepest personal freedom. Speaking for the Court, Justice Douglas, noting that (p. 484) "Various guaranties create zones of privacy" and reviewing the relevant constitutional provisions and authorities, concluded that (p. 485) "These cases bear witness that the right of privacy which presses for recognition here is a legitimate one." and (p. 486) "We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system."

The decision in *Griswold* furnishes a solid foundation for the express recognition of a woman's right to reproductive autonomy. While *Griswold* was concerned with the right to control child bearing through the use of contraceptives, it is hard to believe that that right could have a constitutional basis without there existing a cognate right of a woman who has become involuntarily pregnant, either through the unavailability or failure of contraceptives or for other reasons, to procure a legal abortion in safe and antiseptic surroundings. A woman's choice in bearing children is only freely made if her decision can be made "after" as well as "before" the beginning of pregnancy.

In the next case involving family relationships, the Court held that there is also a basic personal right to choose one's marriage partner and that it was infringed by the long-existing miscegenation statute of Virginia. *Loving v. Virginia,* 388 U.S. 1, 12 (1967).

These decisions, and others, led the Supreme Court of California to conclude in *People v. Belous*, 71 Cal. 2d 954, 458 P. 2d 194 (1969) *cert. denied*, 397 U.S. 915 (1970) that (p. 963):

> "The fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this court's repeated acknowledgment of a 'right of privacy' or 'liberty' in matters related to marriage, family, and sex."

Belous was the first of the modern day cases dealing with the validity of state anti-abortion statutes and expressly declaring the right of reproductive autonomy. It has sparked widespread litigation in other jurisdictions.

Subsequent to *Belous* and *Loving*, this Court has had another occasion to afford protection to still another facet of the civil rights arising out of the intimate relationships of man and woman. Because of "the basic position of the marriage relationship in this society's hierarchy of values," the state's requirement that fees be paid as a condition to bringing a divorce action was held invalid when applied to indigent parties wishing to dissolve that relationship. *Boddie v. Connecticut*, 401 U.S. 371 (1971).

Again, it can be observed that, serious as may be the effects on adults who are required to continue the legal (not the physical) relationship of marriage against their will, it is as nothing compared to the effects on a woman who is compelled to continue a physical state of pregnancy against her will and to undertake the care of a child for a minimum period of its immature years.

Griswold and the right of privacy there upheld, was heavily relied on in *Stanley v. Georgia*, 394 U.S. 557 (1969), holding that the state could not punish "private" possession of obscene materials. In response to an argument that the state had the right to protect the individual's mind from the effects of obscenity (similar to the agument often heard in connection with abortion laws that they are required to prevent promiscuity), the opinion declared (p. 566) that the state cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts. On balance, we believe that the right of a woman to the integrity of her own body, free of interference by the state, must surely be more precious than the right to the private possession of sexually stimulating material.

The right of reproductive autonomy—the right to decide when and where to have children—is at least equal to, and in most instances, even more deserving of recognition than those "fundamental" and "basic" civil rights discussed above, to which the Court has already given protection. Without derogating from the importance of those areas of human relationships already protected, it cannot be over-emphasized that the woman's right asserted here is of such basic importance to her and to her family, and to society as a whole, as to overshadow in any scale of values most of the rights already specifically embraced in the protected constitutional areas.[1]

The concept of a woman's constitutionally protected right to reproductive autonomy, which has only during the past decade become the subject of open and public discussion, has been adopted by a majority of

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[1]See Mr. Justice Clark, *Religion, Morality, and Abortion: A Constitutional Appraisal*, 2 Loyola University L. Rev. 1, 8 (1969).

the lower courts which have decided that issue. In the short period between the decision in *Belous* in September 1969 and the present time, both state courts and federal district courts have held that a woman does have a constitutionally protected right to determine when and where to bear children.[2] Just prior to the filing of this brief, the Court of Appeal, First Appellate District (Division 1) of the State of California, in *People v. Barksdale*, Crim. No. 9526 reiterated the right recognized in *Belous* and held that the 1967 Therapeutic Abortion Act of California (similar in essentials to the Georgia statutes challenged here) was invalid in part in imposing qualifying restrictions upon a woman's ability to procure an abortion. And, of course, in both the present cases, the courts below determined that such a right existed.

In this same period since the *Belous* decision, the fundamental right to decide whether to have a child has been recognized by courts in considering legal issues other than the validity of state abortion laws.

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[2]*Babbitz v. McCann*, 310 F. Supp. 293 (E.D. Wis.) (per curiam), appeal dismissed sub nomine *McCann v. Babbitz*, 400 U.S. 1 (1970) (per curiam); *Babbitz v. McCann*, 320 F. Supp. 219 (E.D. Wis. 1970) (per curiam), judgment vacated sub nomine *McCann v. Babbitz*, 39 U.S.L.W. 3449 (per curiam) (1971); *Doe v. Scott*, 321 F. Supp. 1385 (N.D. Ill.) (1971) docketed sub nomine *Hanrahan v. Doe* and *Heffernan v. Doe*, 39 U.S.L.W. 3438 (1971); *People v. Anast*, No. 69-3429 (Ill. Cir. Ct., Cook County, 1970) (Dolezal, J.); *Commonwealth v. Page*, Centre County Leg. J. (Pa. Ct. Comm. Pl., Centre County, July 23, 1970); *State v. Munson* (S.D. 7th Jud. Cir. Pennington County, Apr. 6, 1970) (Clarence P. Cooper, J.); *State v. Ketchum* (Mich. Dist. Ct. Mar. 30, 1970) (Reid, J.), *Contra: Rosen v. La. Bd. Med. Examiners*, 318 F. Supp. 1217 (E.D. La) (1970), appeal docketed, 39 U.S.L.W. 3427; *People v. Pettigrew*, 2d Appellate Dist., Division 2, Court of Appeals of the State of California. Counsel is aware that the foregoing list may not be exhaustive because of the extensive litigation challenging abortion laws in all states and in courts whose opinions are not necessarily reported.

Thus, in determining whether New York State had the right to limit reimbursment for abortions under the Medicaid program to those abortions which were described as "medically indicated," the Supreme Court of New York County,[3] holding that the state did not have that right, based its decision on the effect such a limitation would have on the fundamental right to determine either to have the child or terminate the pregnancy.

> "In view of the fundamental nature of the right to terminate a pregnancy, and the fact that the State has determined that an abortion may be performed only by a duly licensed physician (Penal Law Section 125.05), the Constitution similarly prohibits the State from denying to indigent women access to physicians in order to exercise this right.
>
> Accordingly, if Section 365-a does not permit Medicaid-reimbursement for *all* lawful abortions, it denies indigent women the fundamental right to decide whether to have a child, and violates the Ninth and Fourteenth Amendments to the United States Constitution."

And in a decision holding that the State of New York could enjoin the activities of an abortion referral agency,[4] the court described abortion laws as those which force women into "servitude as unwilling breeders."

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[3] *City of New York v. Commissioner of Social Services*, State of New York Supreme Court, New York County, Special Term, Part 1, Index #40588/1971.

[4] *In re Abortion Information Agency, Inc.*, reported in the New York Times, May 14, 1971.

We respectfully submit, as *Belous* concluded, that the prior decisions of this Court inescapably require a holding that one of the individual rights protected by the United States Constitution is the woman's right to determine the spacing of her children and to decide whether to carry a particular pregnancy to term.

B. State Anti-Abortion Statutes, Despite Their Long-Standing Duration, Are Subject to Examination for Constitutional Validity in the Light of Contemporary Community Standards.

The Texas statute challenged in *Roe v. Wade* has been in effect without substantial changes insofar as concerns the issue here since 1907; abortion laws of other states using substantially the same standards as that of Texas were for the most part adopted during the latter half of the nineteenth century. The Georgia statute in its present form is a modification of a more ancient statute. No significance can be given to the fact that, for these many years, the constitutionality of these laws went unchallenged. As we have said, it has been only during the past decade that the general public has articulated its present thinking on the need for women to make this decision for themselves. It is undoubtedly for that reason that, both on the judicial and legislative front, reexamination of abortion laws is taking place, a reexamination which is based on an evident growing desire to cast off the shackles of the past.

Neither the failure of society nor of the law to recognize the existence of these non-enumerated rights until recent years impairs their constitutionally protected

status nor precludes this Court from recognizing them. As this Court said in *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966) at 669, *et seq.*:

> "We agree, of course, with Mr. Justice Holmes that the Due Process Clause of the Fourteenth Amendment 'does not enact Mr. Herbert Spencer's Social Statics'. . . . Likewise, the Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process *to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights.* See Malloy v. Hogan, 378 US 1, 5-6. . . ." (Emphasis supplied.)

To the same effect see also *People v. Belous, supra*, at page 967. This Court has not hesitated to strike down an invidious classification "even though it had history and tradition on its side." *Levy v. Louisiana*, 391 U.S. 69, 71 (1968).

On the contrary, the evidence of present community opinion discussed here and the effect of restrictive abortion laws on all concerned, discussed in Part C, are relevant considerations. In the segregation case, *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), this Court, in overturning the long standing constitutional doctrine enunciated in *Plessy v. Ferguson*, 163 U.S. 537 (1896), was at pains to make this clear, stating, at p. 492 "In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson*

was written. We must consider public education in the light of its full development and *its present place* in American life throughout the Nation." (Emphasis supplied.)

With this principle in mind, this Court will properly weigh the woman's right to determine whether and when to bear a child in the context of contemporary considerations.

1. Both prior to and concurrent with developing judicial protection of rights connected with procreation, marriage and the family, nearly every important and representative segment of society has indicated its recognition of a personal right on the part of women to make decisions regarding the bearing of children. In the forefront, a Task Force of the Citizens Advisory Council on the Status of Women, appointed by the President of the United States, whose Chairman was Senator Maureen Neuberger, stated that it was "convinced that the right of a woman to determine her own reproductive life is a basic human right."[8] Many important wom-

[8]Task Force Report on Family Law and Policy, Recommendations of the Citizens Advisory Council on the Status of Women, p. 31 (1968). Subsequently, Senator Neuberger commented on the emergence of the community view as follows—"A few years earlier, I had served on the Status of Women Commission, which was appointed by President Kennedy. Its Chairman was Eleanor Roosevelt, and the Assistant Chairman was Esther Peterson. Mrs. Roosevelt died before we finished our report, and Esther Peterson took over. Our studies of the laws that affect women led us to believe that it was time to talk about abortion laws, but we couldn't get our own Commission to consider such a discussion. It was said that the word "abortion" was verboten; that we couldn't get anything printed about it in government publications. Believing all this, when the task force report came to my desk, I anticipated all sorts of trouble. I expected delays and hours of debate. But not so. What had happened in that interval of a few years? Well,

en's groups have also expressed concurrence in that view.[6] These organizations represent all shades and diversity of opinion. For example, the American Association of University Women has officially declared its belief that abortion should be legal for all those who wish it after medical consultation. Similarly, the National Conference of the Young Women's Christian Associations of the United States, another of the *Amici* herein, included in its action program emphasis on repeal of all laws restricting or prohibiting abortions performed by a duly licensed physician. The list of goals adopted by the National Organization of Women at the First National Conference in Washington, D.C. included implementation of "The right of women to control their own reproductive lives by removing from the penal code laws eliminating access to contraceptive information and devices and by repealing penal laws governing abortion."[7]

Many years ago a famous representative of her sex expressed the position that has now become current.

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an educational process had been going on, organizations had been at work, and there had been a complete change in the emotional climate. The greatest dissension came, as we studied the task force report, over the proposal to amend the maximum hours law to permit women to work overtime. Very little—there was one minority report—on the abortion report." Neuberger, *Abortion, A Political View*, in ABORTION AND THE UNWANTED CHILD (1971) at p. 108.

[6]In addition to the women's groups listed as Amici Curiae, see list of organizations, Note 12, *infra*.

[7]The need for recognition of this fundamental human right in the eyes of the law has been dramatically expressed by groups of prominent French and German women who have sacrificed their personal privacy by signing statements admitting to illegal abortions, thus emphasizing the prison-like effect of the current laws in those countries. Articles in Los Angeles Times, *343 French Women Talk of Abortions*, April 6, 1971; *24 Celebrities Admit to Abortions*, June 3, 1971.

Harriot Stanton Blatch, in Voluntary Motherhood, pungently summarized the difference between wanted and unwanted reproduction.[8]

> "Poets sing and philosophers reason about the holiness of the mother's sphere, but men in laws and customs have degraded the woman in her maternity. *Motherhood is sacred,—that is, voluntary motherhood;* but the woman who bears unwelcome children is outraging every duty she owes the race. (Emphasis supplied.)"

From other groups in the community has come support for the woman's view.

The American Public Health Association, concerned with the invidious effects upon public health of large numbers of illegal abortions and unwanted pregnancies, formally expressed the view that there was an "accepted" personal right to determine the number of and spacing of children; to implement that right, it advocated that safe, legal abortion should be available to all women. It specifically noted that the "provision of abortion within the usual channels of medical care will reduce the well known adverse health effects of illegal abortion."[9]

Both medical and psychiatric groups have publicly taken the same position. It is noteworthy that the American College of Obstetricians and Gynecologists has recently liberalized its position so as to approve abortion on the joint decision of the patient and her physician, without additional medical consultation.[10]

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[8]Reprinted in UP FROM THE PEDESTAL, Ed. by Aileen S. Kraditor (1968) at p. 167 *et seq.*

[9]*AJPA*, January 1969, p. 153.

[10]AMA News, Sept. 28, 1970. See note 12 *infra*, for a list of other medical organizations.

An eminent group of psychiatrists, joining in the recognition of a "woman's right to control her own reproductive life," observed the destructive effects of an unwanted pregnancy upon both mother and the child,[11] destructive effects which are discussed in detail below in Part C of this brief.

Almost all of the important religious groups (except the Roman Catholic Church) have recognized this right of free choice on the part of women by calling for abortion law reform. Among others, the American Friends' Service Committee and the Unitarian Universalist Association have each expressly announced the belief that the right of a woman to decide whether she will bear a child should not be interfered with by government. In its resolution adopted in 1968, the Unitarian Universalist Association stated "A child has a right to a mother who cherishes him . . .".

The roll call increases with almost every meeting of any national group having an interest in religion, health, the family, medicine or effective law enforcement.[12] From the legal profession, the section of Family

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[11]Report No. 75, Group for Advancement of Psychiatry (1970).

[12]The following have endorsed the concept of woman's fundamental freedom in this area.

American Association of Planned Parenthood Physicians, American Baptist Convention, American Civil Liberties Union, American College of Obstetricians & Gynecologists, Americans for Democratic Action, American Ethical Union, American Friends Service Committee, American Humanist Association, American Jewish Congress, American Medical Women's Association, American Protestant Hospital Association, American Psychiatric Association, American Psychoanalytic Association, American Psychological Association, American Public Health Association, Association for Voluntary Sterilization, Church Women United, Board of Managers, Citizen's Advisory Council

(This footnote is continued on next page)

Law of the American Bar Association has stated its conclusion that:

> "The changes in our decisional and statuory law expresses a general recognition that the right to limit family size is a basic human right—that the individual has a right to free choice and self-determination in regard to procreation."[13]

When the American Law Institute first adopted what was then considered a liberal and realistic standard for abortions in its 1959 draft of the Model Penal Code,[14] the Institute proposed that abortions be available to women only when the pregnancy would gravely impair her physical or mental health, when the pregnancy resulted from rape or incest, or where there was danger of a child being born with grave mental or physical defects. In contrast, on August 4, 1970, the Com-

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on the Status of Women, Clergy Consultation Service on Abortion, Episcopal Churchwomen of the U.S.A., Federation of American Scientists, Group for the Advancement of Psychiatry, Izaak Walton League, Medical Committee for Human Rights, Moravian Church, Northern Province Synod, National Association for Repeal of Abortion Laws, National Committee for Children & Youth, National Council of Jewish Women, National Council of Obstetrics-Gynecology, National Council of Women of the United States, National Emergency Civil Liberties Committee, National Medical Associaton, National Organization for Women, Physicians Forum, Planned Parenthood-World Population, President's Task Force on the Mentally Handicapped, Student American Medical Association, Unitarian Universalist Association, Unitarian Universalist Women's Federation, United Automobile Workers Union, United Church of Christ, United Church Board for Homeland Ministries, United Methodist Church, United Presbyterian Church in the U.S.A., Board of Christian Education, Women's Division of the United Methodist Church, Women's Liberation, Young Women's Christian Association of the U.S., Zero Population Growth, Inc.

This list compiled from public statements may represent only part of the many organizations who have taken the same position.

[13]Dembitz, Nanette, *Law and Family Planning*, Vol. 1, FAMILY LAW QUARTERLY No. 4, p. 103, at p. 105.

[14]Draft No. 9, Model Penal Code (1959).

missioners on Uniform State Laws issued a Second Tentative Draft of a Uniform Abortion Act which would authorize abortion within twenty weeks after commencement of the pregnancy, without any further qualification. The proposed Uniform Act, by imposing no substantive restrictions, thus recognized the essentially personal nature of the determination to terminate a pregnancy. The difference in approach between the 1959 Penal Code draft and the 1970 Uniform Act parallels the developing community thinking that took place in the same period of time.

In light of the hundreds of years of silence in which abortion was discussed only in hushed tones, in which the word was never used by any of the mass media and was referred to by newspapers under the euphemism of "illegal operation," the rapidity with which, in recent years, the community has expressed its adherence to the proposition that free choice in areas of procreation is fundamental to the dignity of women and to the best interests of society is virtually astounding.

2. We turn now to a brief mention of the present place of women in the American scene. There has been a basic change in the legal status of women in our society[15] from the period when they were, under the law, unable to control their property, their children or their family life in any fashion, to the present day when

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[15]For a comprehensive review of this evolution in the areas of law, political and civil rights and economic opportunities see Mill, John S., ON LIBERTY, REPRESENTATIVE GOVERNMENT: THE SUBJECTION OF WOMEN (1869); Lifton, WOMEN IN AMERICA (1965); Riegel, Robert E., AMERICAN WOMEN, A STORY OF SOCIAL CHANGE (1970); Flexner, Eleanor, CENTURY OF STRUGGLE: THE WOMEN'S RIGHTS MOVEMENT IN THE UNITED STATES (1959); Friedan, Betty, THE FEMININE MYSTIQUE (1963);

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disabilities with respect to property, divorce, child custody, voting, jury service and others have been largely removed.[15] The woman suffrage amendment (U.S. Const.; Amendment XIX), the provisions prohibiting discrimination under the Equal Employment Opportunities Law (1964) (Civil Rights Act, Title 7, 42 U.S.C. 2000e *et seq.*), and the various Married Women's Property Acts, are all manifestations of a judgment by society that women are no longer to be in a subordinate status.

However, the value of the present right to vote, to equal pay, to equal job opportunities, to choose one's marriage partner, to joint custody of children—which did not, in a legal sense, exist for most women at the time of the passage of state anti-abortion laws—can be sharply decreased by an unwanted pregnancy. To fully implement those rights, this Court should recognize the paramount right of reproductive autonomy which is sought here.

C. The Effects of Abortion Laws Upon a Woman's Life, Dignity and Personal Freedom Are So Serious as to Require the State to Show an Urgent and Compelling Interest to Support Any Restrictions.

Interference with fundamental constitutional rights of the individual must be minimal and must be supported by a compelling state interest. *Bates v. Little Rock*, 361 U.S. 516, 524 (1960); *Sherbert v. Verner*, 374

Kanowitz, Leo, WOMEN AND THE LAW (1969); Kraditor, Aileen S., ed. UP FROM THE PEDESTAL: SELECTED WRITINGS IN THE HISTORY OF AMERICAN FEMINISM (1968); Smith, Page, DAUGHTERS OF THE PROMISED LAND: WOMEN IN AMERICAN HISTORY (1970).

[15]Kanowitz, Leo, WOMEN AND THE LAW, summarizes these changes.

U.S. 398, 406 (1963); *McLaughlin v. Florida*, 379 U.S. 184, 196 (1965); *NAACP v. Button*, 371 U.S. 415, 438 (1963). Even when there is a compelling state interest,[17] the fundamental rights of the individual can, consistent with their constitutionally protected status, be restricted only to the limited extent required by that state interest, and not to any greater extent. *NAACP v. Alabama*, 377 U.S. 288 (1964) and cases cited therein at pages 307-308.[18]

Because the right to choose not to bear a child is a "personal" rather than a purely economic right, there should be a strict scrutiny of the anti-abortion laws which impinge upon the free exercise of that right. See *e.g. Aptheker v. Secretary of State*, 378 U.S. 500, 516 (1964). For a recent reiteration of this distinction see *Dandridge v. Williams*, 397 U.S. 471 at 484 (1970).

A woman whom the law would force to carry an unwanted pregnancy to term is, quite plainly, restricted and imposed upon to a greater degree than by any other action which the state could take, save execution of a sentence of death or possibly long term imprisonment. Such a woman is harmed, not only directly in her person, but in her capacity as the protector of her other children and in her interest in assuring the health

[17]Abortion laws had their genesis in the nineteenth century and represented an application of then prevalent concepts of population growth and sexual morality and some concern for the health of the woman, based on the then current surgical and antiseptic standards. *People v. Belous, supra*, at 964-965.

[18]The state, in its traditional concern for public health and safety in regulating aspects of medical practice may well be able to specify the qualifications of persons authorized to perform abortions or prescribe the period of pregnancy beyond which an abortion cannot be performed. But, in prohibiting abortions altogether except for a limited number of reasons, the state goes beyond the scope of its power.

and well being of the child she is compelled to bring forth. Not only is the woman injured, so too is the unwanted child, her family and society as a whole.

1. The harm to the woman falls into many categories. Consider, first, the horrendous number of women who, rather than face the fact of bringing an unwanted pregnancy to term, are forced into seeking illegal abortions. They are willing to risk violations of the criminal laws or, worse, they risk their very health and lives.

While the realities of law enforcement, social, and public health problems posed by abortion laws have been openly discussed in books, conferences and the press only within a period of not more than the last ten years, one fact appears undeniable, although unverifiable statistically. There are at least one million illegal abortions in the United States each year.[19] Indeed, studies indicate that, if the local law still has qualifying requirements, the relaxation in the law has not diminished to any substantial extent the numbers in which women procure illegal abortions.[20]

The overall effect of illegal abortions has been summarized by the President's Commission on Law Enforcement and Administration of Justice, through the Report of its Task Force on Administration of Justice, (1967) at page 105, *et seq.* as follows:

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[19]The President's Commission on Law Enforcement and Administration of Justice, Report of Task Force on Administration of Justice (1967), p. 105; Rossi, Alice, *Public Views on Abortion,* in Guttmacher, THE CASE FOR LEGALIZED ABORTION NOW, p. 27 (1967); LADER, ABORTION, pp. 2-3 (1966).

[20]Abernathy and Horvitz, *Estimates of Induced Abortion in Urban North Carolina,* DEMOGRAPHY, Vol. 7, Number 1 (1970), p. 19 *et seq.;* Report to the 1970 Legislature, Third Annual Report on the Implementation of the California Therapeutic Abortion Act.

"Abortion laws are another instance in which the criminal law, by its failure to define prohibited conduct carefully, has created high costs for society and has placed obstacles in the path of effective enforcement. The demand for abortions, both by married and unmarried women, is widespread. It is often produced by motives and inclinations that manifest no serious dangerousness or deviation from the normal on the part of the people who seek it. These factors produce the spectacle of pervasive violations but few prosecutions."

"It has been estimated that as many as a million abortions are performed each year in this country, while the arrest rate is not more than one per thousand abortions performed. Two-thirds of all abortions are reportedly performed on married women. Available indications are that only 8,000 to 10,000 of these are legal abortions conducted in a hospital setting."

"The reasons for seeking abortions vary; they include direct danger to the physical health of the mother; the likelihood that the fetus, if born, will be deformed or non-viable; the circumstances of conception, particularly rape, incest, extreme immaturity of the mother, or her unmarried state; the mother's mental health; the low income of the family and its inability to support more children; or simply that the family does not want any more children . . ."

"The present state of the law presents particularly acute problems for conscientious parents and physicians faced with weighty reasons for termi-

nating pregnancy in a jurisdiction where the law is restrictive or its standards are vague and uncertain. Since some highly reputable physicians regard the law as an injustice and want to protect their patients against incompetent abortions available on the black market, large numbers of reputable citizens find themselves in the position of law violators. This tends to contribute to antagonism and resentment toward those who enforce the law."

Since illegal abortions are not likely to be performed in safe facilities or by the most modern antiseptic techniques, they have created a severe public health problem. Investigators have estimated that in the United States five thousand women die each year from criminal abortions and that illegal abortions induced out of hospitals by persons without medical training are at the rate of 100 deaths per 1000 abortions.[21] By contrast, where legal abortions are performed in hospitals by medical practitioners, there are only 3 deaths per 100,000 abortions.[22] The incidence of severe infection from criminal abortion is, as would be expected, very much greater than the incidence of death.[23]

Second, for the woman who is too fearful of breaking the criminal laws or of risking the unsafe procedures of the illegal abortionists, there is no alternative, except

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[21]LADER, *supra*, note 19 at 48-59 (1966); Hardin, Garrett, *Abortion and Human Dignity*, public lecture, presented by Society for Humane Abortion, Inc., Guttmacher, *supra*, note 19, p. 71 (1966); Beck, Newman and Lewitt, *Abortion & National Public and Mental Health Problems*, 59 AJPH 2131, *et seq.*

[22]Tietze, *Mortality with Contraception and Induced Abortion*, 45 STUDIES IN FAMILY PLANNING, 6-8 (1969).

[23]Stevenson & Yang, *Septic Abortion with Shock*, 83 AM. J. OBST. & GYNEC. 1229 (1962).

bringing forth the unwanted child—a development in her life which can never be reversed.

Third, for the unmarried woman, this forced bearing of a child can have additional obvious and undesirable effects on the remainder of her entire life, including the rearing of a future, legitimate family. And, it is no answer to think that adoption of the child will solve her problems, for there may be serious psychological reprecussions for the woman in parting with a child already born, even when the birth was not planned or desired.

For the woman, whether married or unmarried, what has been called compulsory pregnancy[24] may force the abandonment of educational plans, unwilling renunciation of a career, a further demand upon physical energies, which may already be fully drained by repeated child bearing and child care. Her mental health may suffer or be seriously impaired. Direct economic deprivation for both the female concerned and the remainder of her family can be an immediate result. At the present time 41.6% of all women are in the labor force, and 63.9% of the total female labor force is married.[25] Of this total female labor force approximately 60% is within child bearing age.[26] Thus, in our society, curtailment of the woman's wage-earning capaci-

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[24]Professor Hardin has suggested that the appropriate term for the condition of life to which the abortion laws give rise is "compulsory pregnancy." Hardin, Garrett, *Abortion—or Compulsory Pregnancy?*, JOURNAL OF MARRIAGE AND THE FAMILY, Vol. XXX, No. 2, (1968) at p. 249.

[25]Table #330, *Marital Status of Women in the Civilian Labor Force, 1940-1969*, STATISTICAL ABSTRACT OF THE UNITED STATES (1970).

[26]Table #332, *Civilian Female Population Total and Labor Force by Age and Marital Status, 1969*, STATISTICAL ABSTRACT OF THE UNITED STATES (1970).

ties by enforced child bearing can substantially cut the family income. Particularly in the disadvantaged minority groups, the woman may be the main wage earner of the family and her plight and that of the remainder of her family becomes crucial.[37] From the viewpoint of society, the additional pregnancy may force the economically marginal family over the line, so that it thereafter requires public assistance.

2. The woman can be adversely affected in her relationship with her family—her husband and her other children.

The insistence upon compulsory pregnancy too often thwarts the right of both a woman and her husband to a meaningful and happy spousal relationship. A pregnancy unwanted by the woman is normally equally unwanted by the husband. The consequent family tension and bickering, with increased calls upon the husband's economic responsibilities, affect the marriage. Indeed, an unwanted pregnancy has been known to precipitate separation or desertion by the husband.

The mother's unwanted pregnancy may severely handicap her in discharging her duties to her existing children. She who has the primary sociological as well as biological responsibility for rearing children in our society, may be forced to divide her energy in so many directions that even those children she has born willingly, subsequently become, in a sense, unwanted children. No one can deny that the harassed mother can scarcely give her time, attention, and manifestations of affection, to the full extent necessary for the develop-

[37]The Negro Family—the Case for National Action (1965) pp. 20, 23, 32.

ment of her children into sound and whole human beings.

3. It is not unimportant to the consideration of these cases that a child born as the result of an unwanted pregnancy can suffer serious adverse effects, frequently of lifetime duration. The physical, psychological and emotional damage to those having the unhappy status of being an unwanted child is most movingly documented in four case studies of unwanted children reported by a Professor of Pediatrics at the Yale University Child Study Center, New Haven, Connecticut.[28]

Two summaries serve as examples of what, unfortunately, are not rare and isolated instances, but typical of the histories of thousands of children.[29]

> "Tommy, age seven, is in a residential treatment center for emotionally disturbed children after passing through five foster homes. I first saw him when he was three. He had been admitted to our hospital because of malnutrition and delayed physical and mental development. The story we have heard is not uncommon. He was the fourth child born within five years to an immature woman of twenty-two. At the time of his hospitalization, she told us how unhappy she had felt about this, her fourth pregnancy; that having one more child was just too much for her. Childlike, and in precarious physical health, she was unable to cope with the many responsibilities of caring for, four young

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[28]*Provence*, Sally, *Unwanted Children: Four Case Studies*, a chapter in ABORTION AND THE UNWANTED CHILD, *supra* note 5 at pp. 73-75.

[29]For a general discussion of this problem see *Beck*, Mildred B., *The Destiny of the Unwanted Child: The Issue of Compulsory Pregnancy*, in ABORTION AND THE UNWANTED CHILD, *supra*, note 5, at p. 59.

children, and her burden was increased by an alcoholic husband who worked only intermittently. Although he was interested in her and the children at times, he was frequently neglectful or abusive.

Tommy improved during hospitalization and his parents asked for foster care for him, Tragically, no placement could be sustained for very long—twice because of illness of the foster mother; twice because foster parents, at first motivated to help him, became exhausted with his difficult behavior and his limited responsiveness to their efforts. The residential treatment staff will work with Tommy, trying to rehabilitate him so that he can adjust to family life—an objective of great importance in giving him some hope for the future. Physically, he is now in good condition. Intellectually, he functions at a dull normal level. In his ability to learn, to establish controls over his behavior, and to love others, he is crippled. Experience with similar cases has shown that the chances that he will become an adult who can maintain himself and assume appropriate adult responsibilities are not favorable.

Laurie, four years old, was brought to our clinic at sixteen months by her well-to-do parents who feared she was mentally defective. Two older siblings were doing well. In her first year, Laurie had had two caretakers besides the mother, each of whom was devoted to her for a short time. Laurie's mother was a competent, articulate, conscientious person, who devoted much time and effort to community activities and to her two older children. The father was a responsible man, a hardworking

partner in a successful business, and devoted to his wife and the two older children.

Laurie, we found, was an unwanted child of an unwanted pregnancy—a pregnancy during which her mother felt unloved and unlovely. She endured the pregnancy as a sentence to be served before she could again return to the world. In Laurie's infancy her mother was unable to feel close to her, to nurture her in the ways that are crucial to an infant's development. She dressed her in beautiful clothing, but gave little of herself. While she was concerned and guilty, she put other things first. The child had no biological defect; her intellectual, emotional, and motor development were delayed and distorted by the deficits in her care. With casework assistance, the parents have been able to modify some of their behavior so that Laurie is more a part of the family and more time is devoted to her. The parents have provided her with a good nursery school and other social and educational experiences. They have made a conscientious effort to understand her needs. Laurie no longer looks like a mentally retarded child, but her learning is erratic and her interactions with others lack richness and depth. She is attached to her parents and siblings, but not closely. Emotionally starved and isolated by intelligent parents in the midst of economic affluence, she is, sadly, a four-year-old shadow of a person. I fear she can be expected to be an inadequate mother to her own children twenty years from now."

The long term consequences for the community were demonstrated by a innovative study of one hundred and twenty children born in Sweden after their mothers'

request for a therapeutic abortion was refused. The findings of that review have been summarized as follows:

> "A study made of Swedish children born when their mothers were refused the abortions they had requested showed that unwanted children, as compared with their controls, as they grew up were more often picked up for drunkenness, or anti-social or criminal behavior; they received less education; they received more psychiatric care; and they were more often exempted from military service by reason of defect. Moreover the females in the group married earlier and had children earlier, thus no doubt tending to create a vicious circle of poorly tended children who in their turn would produce more poorly tended children."[30]

As noted in the foregoing comment, in addition to the effect of the unwanted pregnancy upon the mother and upon the unwanted children, those unwanted children who are economically or emotionally harmed, transmit their psychosocial pathology to succeeding generations. Women forced to bear unwanted children have often themselves been raised in households in which they were unwanted, and they in turn may be forced by restrictive abortion laws to raise their children in the same circumstances.[31] The long term effects upon society are quite literally incalculable but our society also suffers most directly. Observation in

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[30]Hardin, Garrett, *Abortion—or Compulsory Pregnancy? supra*, note 24, at 249. The full study is set out as Appendix A in ABORTION AND THE UNWANTED CHILD, *supra*, note 5.

[31]Beck, *supra*, note 29, at p. 62.

the United States demonstrates, and the Swedish study of the parallel problems in Sweden gives concrete evidence of, the direct cost in alcoholism, drunkenness, crime and welfare costs with which society is faced.

Particularly acute is the problem of the unwanted child who is also illegitimate; and illegitimate births are frequent. The proportion of live births which occur to unmarried women has risen startlingly; since 1940 the percentage of live births which are illegitimate has increased from 3.5% to 9.7% of all births.[32] The number of illegitimate births to mothers of minorities is far out of proportion to the ratio of such minorities in the whole population.[33]

The foregoing effects of bringing to term an unwanted pregnancy have undoubtedly contributed to the deep felt need of women to determine for themselves, without outside restrictions, whether to bear a child. That need shows quite plainly in the increase in legal abortions. Since there has been a lessening of the restrictions on legal abortions it has been possible to compile reliable statistics, and to see that there is a direct relationship between the availability of legal abortions in any jurisdiction and the proportion of women who have elected to procure such legal abortions.

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[32]Table #58, *Illegitimate Live Births By Age and Race of Mother: 1940-1968*, STATISTICAL ABSTRACT OF THE UNITED STATES (1970).

[33]For example, in 1968 (the last year for which reports have been published), 54.2% or 183,900 illegitimate births occurred to "negro and other mothers" while 155,200 illegitimate births occurred to "white" mothers. Table #58, *supra*.

This sharp (but not unexpected) rise in the number of legal abortions in jurisdictions where laws have been reformed or medical practice basically modified has an obvious implication: when women have received complete or partial recognition of their right of reproductive autonomy, they have exercised the right to an extent directly correlated with the degree of permissiveness of the law and medical practice.[34]

[34]Table 2, statistics titled REPORTING AND SURVEILLANCE OF LEGAL ABORTIONS IN THE UNITED STATES, 1970, compiled by Carl W. Tyler, Jr., M.D. Chief, Family Planning Evaluation Activity, Epidemiology Program, Center for Disease Control; Judith E. Bourne, R.N., M.S., Nurse Epidemiologist, Family Planning Evaluation Activity, Epidemiology Program, Center for Disease Control; S. Beach Conger, M.D., Special Studies Officer, Family Planning Evaluation Activity, Epidemic Intelligence Service, Center for Disease Control; James B. Kahn, M.D., Abortion Surveillance Officer, Family Planning Evaluation Activity, Epidemic Intelligence Service, Center for Disease Control; presented at CONFERENCE ON ABORTION TECHNIQUES AND SERVICES, Barbizon-Plaza Hotel, New York, New York, June 3-5, 1971; U. S. DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, PUBLIC HEALTH SERVICE, Health Services and Mental Health Administration Center for Disease Control, attached as Exhibit A. In California more than 62,000 legal abortions were performed in 1970, rising from 5,030 abortions in 1968 and 15,339 in 1969.

Conclusion.

This Court, we respectfully submit, should recognize the existence of a fundamental, constitutional right on the part of a woman, to determine, along with her personal physician, the number and spacing of her children. This right is of a personal nature, and attempts to restrict its exercise are, therefore, subject to strict scrutiny and can be justified only by reason of a most compelling state interest.

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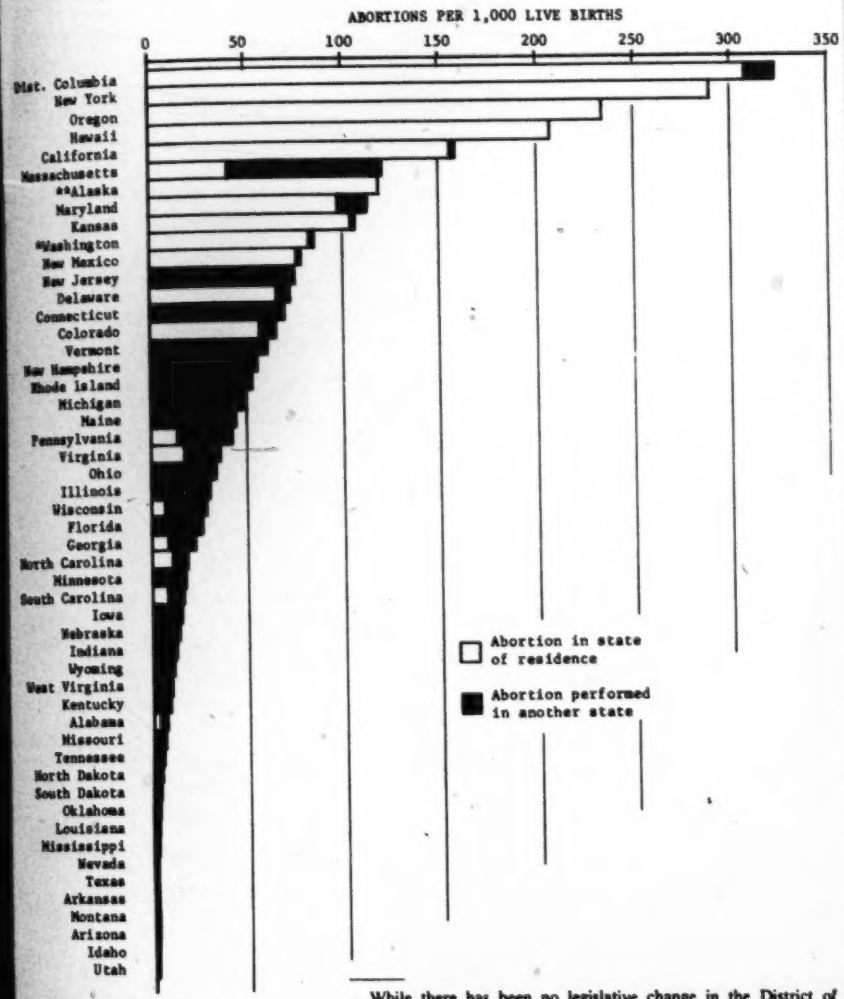
Figure 2 RATIOS OF REPORTED LEGAL ABORTIONS TO LIVE BIRTHS, BY STATE OF RESIDENCE, IN RANK ORDER, JULY – DECEMBER 1970



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While there has been no legislative change in the District of Columbia, hospitals and doctors accepted the lower court ruling in *United States v. Vuitch*, 305 F. Supp. 1132 (D.D.C. 1969) reversed United States v. Vuitch, ... U.S. ....., 39 L.W. 4464 (1971) and legal abortions were widely performed. In Georgia, listed as 27 in order of ratio of legal abortions to live births, the number of legal abortions was apparently severely limited by the procedural requirements of the statute, upheld by the District Court.